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I. Introduction

Many legal questions are variations of the conflict between competing societal needs for certainty and flexibility. The constitutional lawyer's version of this dilemma is the long-standing controversy over whether constitutional courts should utilize categorical or balancing methods in fundamental rights adjudication. The principal arguments of the debate are by now: categorical or rule-like decision-making fosters consistency, stability, and predictability; a balancing process or standard-like decision-making, by contrast, ensures adaptability to changing social conditions and the particular circumstances of each case. While the virtues and drawbacks of certainty and flexibility constitute the most familiar line of argumentation in this debate, other, often related justifications have been advanced by those advocating adherence to either rules or standards in constitutional adjudication.[1] Although the literature is vast, the battleground for the struggle between the different camps in the balancing versus categorization debate has generally been limited to domestic constitutional review. This article broadens the debate to

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1. *See infra* Part II.B.1.

international human rights adjudication to propose that the arguments on both sides cannot be considered in the abstract, but depend on various factors, one of which is the nature of the court that is charged with adjudicating the matter at issue.

To shift the focus from domestic to international human rights does not remove the tension between the different values and interests at play. On the contrary, some of the arguments on both the pro-balancing and pro-categorization sides gain particular importance when the decision-making authority is located in a multinational court. On the one hand, the use of a reliable and predictable method of adjudication is indispensable when the court is in a position to give guidance to a great number of domestic decision-makers and prospective applicants to the Convention on Human Rights. However, on the other hand, the creation of an inflexible doctrine at the international level is problematic given the subsidiary role a multinational court plays in the enforcement of applicable rights in states with different constitutional identities. This role entails, among other things, that such a court is usually not a final court of appeal or fourth instance, and that it is not to substitute its views for that of domestic courts which bear the primary responsibility for the enforcement of regional or international guarantees (or similarly worded domestic constitutional provisions).[2] The guiding idea of this article is that international courts should, in their decision making process, seek to find a middle ground between these opposing concerns. In other words, an international tribunal's style of opinion writing should reflect the inherent tension between its constitutional guidance function on the one hand, and the principle of subsidiarity on the other.

The solution put forward here is that courts, responsible for supervising human rights compliance in different nations should engage in what might be called structured balancing. This is an adjudicatory style that avoids the inflexible, rule-like approach that is prominent in several constitutional courts, most notably the United

2. *See generally* Herbert Petzold, *The Convention and the Principle of Subsidiarity*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 41 (Ronald St. John MacDonald, Franz Matscher & Herbert Petzold eds., 1993); STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS 216 (2006) (European Convention on Human Rights context); ELIES STEYGER, EUROPE AND ITS MEMBERS: A CONSTITUTIONAL APPROACH (1995); and HEINER TIMMERMANN, SUBSIDIARITÄT UND FÖDERALISMUS IN DER EUROPÄISCHEN UNION (1998) (European Union context).

States Supreme Court, but also shies away form unprincipled ad-hoc proportionality review, which is prominent is many venues of international human rights adjudication. The former approach may be suitable for domestic constitutional adjudication, but it is, as we will argue, a style of reasoning inappropriate in a supranational context. Similarly, the latter approach may have its advantages in some contexts, but it is unsuited for supranational judicial decision-making.

In order to develop the concept of structured balancing, this article will draw on the jurisprudence and practice of the European Court of Human Rights (hereinafter the "European Court" or "Strasbourg Court"). Part I of this article begins with a description of the differences between balancing and categorization and an overview of the arguments commonly invoked in their defense. These issues are considered in light of the distinctive features of international human rights adjudication. Part II provides an outline of the structured balancing approach. With this theoretical background in place, Part III then shifts focus toward the approach taken by the European Court under the European Convention on Human Rights (hereinafter the "European Convention").[3] Part IV illustrates the concept of structured balancing by means of three case studies; the first addressing the treatment of the Islamic headscarf, the second the issue of physician- assisted suicide and, the third the Convention's approach to restrictions of antidemocratic political parties. One the whole, the purpose of this article is an attempt to reveal some of the virtues and vices of the different approaches, and to offer arguments to direct the Strasbourg Court towards a more structured-decision making process.

II. Balancing and Categorization

A. The Balancing-Categorization Continuum

In constitutional law, balancing and categorization are usually seen as two conflicting methods for reconciling individual rights with competing government interests. The theoretical distinction originated in the United States,[4] but soon appeared in doctrinal

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, E.U., Nov. 4, 1950 [hereinafter *Convention*], ETS No. 005.

4. The balancing/categorization dispute in American constitutional law can be traced back to the balancing/absolutism debate in early First Amendment doctrine.

writing in other constitutional democracies.[5] The difference between both approaches lies in the measure of discretion each of them accords to decision-makers interpreting and applying constitutional provisions. To clarify the nature of categorization and balancing it is instructive to look to legal theory's traditional opposition between "rules" and "standards."[6] Rules and standards translate certain background principles and policies – e.g., autonomy, democracy, efficiency – into legal directives.[7] Where they differ, however, is in the degree of discretion they each confer upon the decision-maker. American constitutional scholar Kathleen M. Sullivan gives the following account of the rules versus standards dichotomy: "Rule-like" legal directives, she writes, "[bind] a decision-maker to respond in a determinate way to the presence of delimited triggering facts."[8]

See Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 398 (1985). Proponents of the absolutist view usually accepted that the 'absolute' nature of the First Amendment does not imply that it is unlimited in scope. In the process of delineating the scope of the right to freedom of speech at the definitional stage, rule-like exceptions to the First Amendment's scope are identified. Critics of the absolutist view defended an approach that would focus less on defining the categories of protected and unprotected speech, and more on balancing free speech and countervailing interests. *See* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434 (1962) (defending the absolutist view); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962) (defending a balancing view).

5. For the United States, *see, e.g.,* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles versus Supreme Court Practice*, 78 VA. L. REV. 1521 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards* 106 HARV. L. REV. 22 (1992) [hereinafter Sullivan, *Justices*]; Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992) [hereinafter Sullivan, *Categorization and Balancing*]. For Canada, *see, e.g.,* Pierre Blanche, *The Criteria of Justification Under Oakes: Too Much Severity Generated Through Formalism*, 20 MAN. L.J. 437 (1991); Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101 (2000); Andrew Lokan, *The Rise and Fall of Doctrine under Section 1 of the Charter*, 24 OTTAWA L.R. 163 (1992).

6. On the distinction between rules and standards, *see, e.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Schlag, *supra* note 5; Sullivan, *Justices*, *supra* note 6, at 57-63.

7. Sullivan, *Justices*, *supra* note 6, at 57.

8. Sullivan, *Justices*, *supra* note 6, at 58. *See also* Kennedy, *supra* note 7, at 1687-1689 (1976) (discussing Von Ihering's concept of "formal realisability"); Schlag, *supra* note 5, at 381-383; FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1998) [hereinafter Schauer, *Playing by the Rules*] (describing rules as entrenched instantiations of background justifications).

"Standard-like" legal directives, by contrast, "[tend] to collapse decision-making back into the direct application of the background principle or policy to a fact situation."[9] In other words, rules give the decision-maker less discretion than do standards because rules limit the number of factors he or she may take into account (the "triggering facts"), whereas standards allow the decision-maker to consider all the relevant factors, including the background principles and policies that motivate the standard.[10] Sullivan goes on to demonstrate that the distinction between balancing and categorization is just another way to conceptualize the rules versus standards dispute.[11] The balancing method is standard-like, in that it allows the decision-maker a realm of discretion to weigh the different rights and interests implicated by the case against the background principles at stake.[12] The categorical approach, by contrast, limits future decisional discretion: once the boundaries of a category have been established, there is no more room for the further consideration of the different facts and interests involved. Hence, the categorical style is rule-like.[13]

The categorical versus balancing divide is not an absolute dichotomy. It is rather a continuum representing the varying degrees of discretion, which a particular method of adjudication provides to future or subordinate decision-makers.[14] At the far end of the categorization pole are rigid, bright-line rules, limiting the decision-makers' work to the determination of which category the factual situation at bar falls under the prescribed rule.[15] At the far end of the balancing pole are wholly open-ended standards, allowing decision-makers to weigh competing rights and interests on a case-by-case basis. In between those two extremes, numerous forms of

9. Sullivan, *Justices*, *supra* note 6, at 59.

10. *Id.* at 58-59. *See also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 536 (1988) [hereinafter Schauer, *Formalism*] ("By limiting access to the reasons behind the rule, rules truncate the array of considerations available to a decsionmaker.").

11. Sullivan, *Justices*, *supra* note 6, at 59.

12. *Id.* at 60. *See* also Richard H. Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 80 (1997) (defining 'balancing' as "a metaphor for (rather than a literal description of) decision processes that call for consideration of the relative significance of a diverse array of potentially relevant factors."). For a discussion of different forms of balancing, *see* Aleinikoff, *supra* note 6 at 945-948.

13. Sullivan, *Justices*, *supra* note 6, at 59.

14. *See, e.g.*, Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828-32 (1991).

15. Sullivan, *Justices*, *supra* note 6, at 59.

adjudication exist that leave more or less room for balancing. Some methods will be more rule-like; others more standard-like.[16] In other words, the choice is not so much between whether to exclusively use categorization of balancing methods, but rather how much balancing or categorization to use in a particular context.

B. Justifications

i. Conventional Justifications

Before considering why either categorical or balancing methods would be most appropriate in international human rights adjudication, this section briefly reviews some of the advantages and disadvantages, typically attributed to rules and standards, in order to lay the groundwork for the discussion to follow. The longstanding jurisprudential disagreement produced a host of stereotyped arguments for and against rules or standards in legal analysis in general,[17] and fundamental rights adjudication in particular.[18] The virtues most commonly associated with rule-based decision-making are certainty, predictability, and consistency.[19] The attraction of the categorical approach lies in its ability to restrain decisional discretion, thus allowing those affected by a legal directive to foresee the consequences of their behavior. Other recurring arguments for rule-based decision-making include fairness and the restraint of arbitrary official action,[20] efficiency,[21] and democracy.[22] The use of categorical

16. Several attempts have been made at ranking the different "tests," "formulas," "prongs" and "standards" in American constitutional law on the balancing/categorization continuum. *See, e.g.,* Faigman, *supra* note 6, at 1534.

17. Schlag, *supra* note, 5 at 383 (arguing that the rules/standards debate "has given rise to patterned sets of 'canned' pro and con arguments about the value of adopting either rules or standards in particular contexts.").

18. References are generally limited to the literature concerning constitutional adjudication. *See, e.g.,* Fallon, *supra* note 11, at 79-82; Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Schauer, *Formalism*, *supra* note 11, at 538-545; Schauer, *Playing by the Rules*, *supra* note 9, at 135-166; Schlag, *supra* note 5, at 383-390; Sullivan, *Justices*, *supra* note 6, at 62-69; SÉBASTIEN VAN DROOGHENBROECK, LA PROPORTIONNALITÉ DANS LE DROIT DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME. PRENDRE L'IDÉE SIMPLE AU SÉRIEUX, 335-423 and 853-1045 (2001).

19. *E.g.,* Schauer, *Playing by the Rules, supra* note 9, at 137-145.

20. *E.g.,* Kennedy, *supra* note 7, at 1688 ("Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purpose of the rule.").

21. *E.g.*, Schauer, *Playing by the Rules, supra* note 9, at 145-149. Efficiency is

methods in constitutional adjudication may foster these values in several ways.[23] Critics of categorization, however, question the desirability of rule-based decision-making. Their main objection against rules is that the latter do not permit decision-makers to take into account all the relevant differences and similarities between particular cases.[24] While a rule-based process constrains decision-makers from arbitrary behavior, it also dictates certain outcomes regardless of specific facts, which may in turn result in arbitrary decisions. In other words, predictability and consistency are achieved at the cost of fairness and substantive justice.[25] More flexible balancing approaches allow decision-makers to adapt to the changing circumstances, therefore not forcing "the future into the categories of the past."[26] In addition to the advantages associated with flexibility, balancing has been praised for its deliberation- and democracy-enhancing potential. By compelling a decision-maker to openly explain and justify her choices, balancing would further accountability and extended dialogue about constitutional values.[27]

ii. Justifications and International Human Rights Adjudication

Having outlined the categorization and the balancing framework, the question now posed is which may be most appropriate for an

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linked to certainty, because certainty allows private persons to order their affairs productively. *See, e.g.,* Sullivan, *Justices, supra* note 6, at 62-63.

22. A common objection against balancing approaches is that they transfer the responsibility for weighing competing public interests from the political branches to the judicial branch. *See, e.g.,* Aleinikoff, *supra* note 4, at 984-986; Sullivan, *Justices, supra* note 6, at 64-65. *See also* Schauer, *Playing by the Rules, supra* note 9, at 158-162.

23. For a discussion of the justifications for categorical decision-making in constitutional adjudications, *see* Scalia, *supra* note 19.

24. As a result, rule-based decision-making necessarily entails a number of wrong decisions. The reason therefore is that rules, as generalizations, are over- and/or under-inclusive from the perspective of their background justifications. *See, e.g.,* Schauer, *Playing by the Rules, supra* note 9, at 31-34.

25. Sullivan, *Justices, supra* note 6, at 66 ("Standards are... less arbitrary than rules. They spare individuals from being sacrificed on the altar of rules...."). A similar concern was voiced by Supreme Court Justice Stevens in several First Amendment cases. According to Stevens, the categorical approach to the First Amendment "sacrifices subtlety for clarity" and "does not take seriously the importance of context" (see R.A.V. v. St. Paul, 505 U.S. 377, 426 (1992)).

26. Schauer, *Formalism, supra* note 11, at 542.

27. *See e.g.*, Horwitz, *supra* note 6, at 105; Michelman, *The Supreme Court, 1985 Term – Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986); Sullivan, *Justices, supra* note 6, at 67-69.

international tribunal with jurisdiction over an international treaty? Commentators have endlessly debated the distinctive features of a system of international human rights protection as opposed to a domestic one. Yet, the focus of this debate has generally been on matters of substance, the most controversial issue, perhaps, being the doctrine of the margin of appreciation, a concept that is featured in the case law of the Strasbourg organs among other supranational bodies.[28] Matters of form have generally been overlooked in these debates. This article proposes that form and substance cannot be separated, and that assumptions about the proper role of an international human rights court should inform not only the substantive result of a case (for instance the width of the margin of appreciation), but also the form, for instance the choice between categorization and balancing, through which that result is reached. Although many of the conventional arguments in the rules/standard controversy can easily be transposed to the realm of international judicial decision-making, others merit particular attention in this context. They can be grouped in three interrelated categories: certainty; efficiency; and jurisdiction.

a. Certainty

Of all the values that have been associated with a rule-like mode of decision-making, none is easier to envision than certainty. A clear and predicable legal directive allows the addressees to comply with it and to adjust their activities in advance. This is a key element of the rule of law. Several commentators of the European Convention have drawn attention to the significance of legal certainty for the effective enjoyment of its guarantees.[29] A number of virtues have been attributed to certainty in this context: a predictable rule may result in an increased likelihood of compliance with fundamental rights standards by the Contracting States and in the removal of inhibiting

28. *See infra* Part III.B for the European Convention; Inter-Am. Ct. of H.R., *Advisory Opinion OC-4/84* of 19 January 1984, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, ¶¶ 36, 58-59; *Hertzberg v. Finland*, Doc. A/37/40, 161 at 165: SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL (SECOND TO SIXTEENTH SESSIONS) 124 at 126, ¶ 10.3 for the United Nations Human Rights Committee.

29. *See, e.g.*, Olivier De Schutter, *Les cadres du jugement juridique*, 2 ANNALES DE DROIT DE LOUVAIN 177, 194 (1998); Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM.. RTS. L.J. 57, 77 (1990); Drooghenbroeck, *supra* note 19, at 933-1000.

effects on protected behavior by the beneficiaries of those rights.[30] In other words, the bearers of rights will be more inclined to exercise their rights if they were reasonably certain of the real extent of the protection afforded them.

An issue closely related to certainty is the guidance function of a court. The connection between the categorization/balancing controversy and the guidance function of a court has received ample attention in domestic constitutional jurisprudence.[31] Judges and scholars argue that the highest courts within a domestic court system should, given their supervisory role, adopt a mode of reasoning that gives sufficient direction to the lower courts. This pertains to what can be described as the constitutional function of the highest courts, as such courts have to see to the integrity and ultimately the certainty provided under a particular legal system, by ensuring that lower courts are clear as to the constitutional parameters within which they are called to dispense justice. This constitutional function forms part of a legal system's internal culture, namely the interaction between different spheres and actors within a legal system, and in this respect between various courts. Perhaps, the fostering of an adequate internal culture is even more pressing in respect of international courts, given the many different jurisdictions they oversee, the heterogeneity of the population of the Member States, and the diversity of the lower court systems requiring constitutional guidance. Much then obviously centers on the structure of decision-making employed by international courts in steering domestic courts and tribunals as to their constitutional responsibilities.

Legal systems, however, are not only characterized by an internal culture, but also by external relationships. Courts must, in this regard, provide the litigant parties before them with certainty as to their claims and positions on the law. Courts' external relationships are comprised of both a constitutional and a remedial function. The former implies that courts must provide sufficient guidance and certainty to political actors in terms of their legal responsibilities,

30. In this respect, *see* Kennedy, *supra* note 7, at 1688-89 (arguing that a rule "increases the likelihood that private activity will follow a desired pattern" and that "it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe.").

31. *See* Scalia, *supra* note 19, at 1179 ("To adopt such an approach [balancing], ... is effectively to conclude that uniformity is not a particular important objective with respect to the legal question at issue."); Horwitz, *supra* note 6, at 108; Bertha Wilson, *Decision-Making in the Supreme Court*, 36 U. TORONTO L.J. 227, 233-35 (1986) (both discussing decision-making in the Canadian Supreme Court).

thereby minimizing the instance of legal proceedings. In turn, supranational courts need to provide certainty not only to lower courts, but also to a wide variety of domestic political decision-makers and law enforcement agencies that are subject to the same treaty obligations. Obviously, courts also have a remedial function in solving disputes, thereby giving satisfaction to those seeking justice. However, as opposed to national courts, the remedial function of international tribunals, although important, is not their prime function. For example, the Convention organs are simply not equipped to provide individual justice to all of its 800 million prospective litigants in the same measure as national courts are with respect to such matters as caseloads and fact-finding.[32] However, the Strasbourg Court is called upon to foster relationships, both internally and externally, enabling it to discharge its constitutional function to provide adequate legal certainty to national courts and political actors as to their responsibilities under the Convention. This again stresses the need for an effective and clear decision-making mode in setting the pace for others actors to follow. This does not mean, however, that the remedial function is to be neglected. Subsidiarity will only be strengthened as national authorities are able to make proper decisions based on clearer international guidelines. In other words, a rule-like opinion not only provides guidance to national governments and their citizens, but also to the lower domestic courts, which have the primary responsibility for enforcing treaty obligations.

b. Efficiency

A related benefit of the categorical mode of judicial decision-making is efficiency. Rules produce decision-making economies by allocating the limited decisional resources of individual decision-makers, freeing them from the responsibility of scrutinizing every relevant aspect of a situation.[33] As Sullivan writes, rules minimize "the elaborate, time-consuming, and repetitive application of background principles to facts".[34] The time-saving potential of categorization may be of particular significance with regard to the

32. Luzius Wildhaber, the former President of the Strasbourg Court, defended a similar view on 14 May 2002 in his address to the Conference of European Constitutional Courts XIIth Congress entitled *The Place of the European Court of Human Rights in the European Constitutional Landscape. See also* Greer, *supra* note 3, at 165-74.

33. Schauer, *Playing by the Rules, supra* note 9, at 145-49.

34. Sullivan, *Justices, supra* note 6, at 63.

work of an international tribunal that has – unlike certain national courts of last resort[35] – no discretion to reject applications, and may accordingly be faced with an enormous caseload.[36] The elaboration of a more formalized doctrine would permit such courts to more easily dismiss cases at an early stage (e.g., the admissibility stage), than when it must go through all the stages of an ad hoc balancing standard. The time and resources saved may be used for a more careful analysis of novel claims thereby bolstering the bench's desired constitutional function.

For example, the Strasbourg Court has in recent years been confronted with an increasing number of cases. The expansion of the Council of Europe has led to more potential litigants from a greater number of different jurisdictions. Add to this an increasing rights consciousness and the system may threaten to become backlogged.[37] The Court has the largest territorial jurisdiction of all permanent international courts in the world and sees more applications lodged with it as every year passes. The response to this challenge to date has been to question the structure of the Strasbourg organs. Whereas the erstwhile Commission was called upon to filter applications and select only those important enough to be referred to the Court, the system no longer knows a distinction between a Commission and Court. Instead, Protocol 11, which took effect on November 1, 1998, created a permanent court, the members of which sit in committees of three, Chambers of seven and a Grand Chamber of 17 judges.[38]

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35. *See, e.g.*, SUP. CT. R. 10, ("Review on writ of certiorari is not a matter of right, but a judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.").

36. *See also* J.H. Gerards, *Belangenafweging bij rechterlijke toetsing aan fundamentele rechten* 16 (Kluwer, 2006) (Balancing and Judicial Review of Fundamental Rights); Drooghenbroeck, *supra* note 19, at 994; Colin Warbrick, *Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073, 1096 (1990).

37. Whereas 82 provisional applications were lodged in 1955, 16,353 such applications were lodged by 1998 before the system's reform. At the end of 2006, 89,887 applications were pending before the Court. In that year the Court managed to hand down 1,560 judgments, while more than 40,000 applications were declared inadmissible, struck off or dealt with administratively. Although 2006 saw a forty-percent increase in the number of judgments handed down in comparison to 2005, serious concerns still persist about clearing the caseload. *Cf.* the Court's *Survey of Activities 2006* (Registry of the European Court of Human Rights, 2007); Greer, *supra* note 3, at 36-41.

38. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery, May 11, 1994, ETS No. 155. *See* Stefan Trechsel, *Towards the Merger of the Supervisory Organs: Seeking a*

Committees have to filter applications by striking patently inadmissible cases from the list, while most cases are heard by Chambers, which may relinquish jurisdiction to the Grand Chamber upon request of the parties or where the possibility arises to deviate from earlier case-law.[39] The Grand Chamber also acts as a sort of appellate court, by re-examining serious cases decided by a Chamber.[40] These reforms, designed to streamline the Court, soon proved to be inadequate. As a matter of fact, Protocol 14, signed on May 13, 2004, and yet to be ratified by all Member States, would allow judges sitting by themselves to strike inadmissible cases from the list in order to manage the thousands of applications.[41] The prospect of European Union accession to the Convention also heightened concerns that the Court may fail to live up to its reputation in the future.[42] The Explanatory Report to the Protocol reiterates the system's subsidiary character, laying the primary responsibility for securing the Convention's rights and freedoms on the signatory states.[43] Although these practical and structural proposals for reform are undoubtedly important attempts at strengthening the Court's efficiency, a change in the style of decision-making may likewise serve to temper the weight of the burdensome caseload. A change in decision-making holds a number of advantages that will also complement practical reforms.

For example, it may be easier for the Court to reshape its adjudicative style than to embark on the long and technical road of periodically amending the Convention's control system.

Way out of the Deadlock, 8 HUM. RTS. L.J. 11 (1987); Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol 11, Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81 (1994); Hans Christian Krüger, *Selecting Judges for the New European Court of Human Rights*, 17 HUM. RTS. L.J. 401 (1996); Henry G. Schermers, *Election of Judges to the European Court of Human Rights*, 23 EUR. L. REV. 568 (1998); Alastair R. Mowbray, *The Composition and Operation of the New European Court of Human Rights*, Summer PUB. L. 219 (1999); Marie-Bénédicte Dembour, *'Finishing off' Cases: the Radical Solution to the Problem of the Expanding ECtHR Caseload*, 46 EUR. HUM. RTS. L. REV. 604 (2002).

39. *Convention*, *supra* note 4, arts. 27 and 30.

40. *Convention*, *supra* note 4, art. 43.

41. Protocol 14 to the European Convention on Human Rights, Amending the Control System of the Convention, May 13, 2007, ETS No. 194. *See* Alistair Mowbray, *Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases*, 4 HUM. RTS. L. REV. 331 (2004); Greer, *supra* note 3, at 42-47.

42. *Explanatory Report: Protocol 14 to the European Convention on Human Rights, Amending the Control System of the Convention*, CETS no. 194, ¶ 13.

43. *Id.* at ¶ 12.

Furthermore, by focusing more on the filtering of applications, as is also the case with the highest courts in the United States and Germany, the Court implicitly affirms its constitutional nature. As explained above, this means that the Court is there to direct domestic courts and other decision-makers, instead of attempting to see to individual justice as if it were a district court. Not only will the Court's attention be turned to its practical workings in this respect (e.g. filtering procedures), but also, importantly, to its intellectual labors in the reasoned shaping of judicial doctrine.

c. Jurisdiction

Whereas the first two arguments seem to point in the direction of a more categorical approach in supranational human rights adjudication, the next argument reveals the complexity of this issue. As noted in the previous section, participants in the rules versus standards debate often invoke democracy-related arguments. An explanation can be found in that the choice between rules and standards has important consequences for the division of authority between competing decision-makers. Frederick Schauer explains the rules versus standards dichotomy with reference to the concept of jurisdiction: "[T]he essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers."[44] In other words, role-allocation between legislative and judicial decision-makers may explain a preference for rules over standards or vice versa.[45] The ability of rules to constrain a decision-maker's authority has frequently been invoked in the context of domestic constitutional review as a means of ensuring judicial restraint.[46] Emphasis on the primacy of the legislature and the democratic legitimacy it provides may see the judiciary limited to crafting neat rules in order to leave the balancing of competing interests, as much as possible, to those

44. Schauer, *Playing by the Rules, supra* note 9, at 231-232.

45. *Id.* at 158-162 ("Rules ... operate as tools for the allocation of power. A decision-maker not constrained by rules has the power, the authority, the jurisdiction to take everything into account. Conversely, the rule-constrained decision-maker loses at least some of that jurisdiction.").

46. *See, e.g.*, Aleinikoff, *supra* note 6, at 984-986; Scalia, *supra* note 19, at 1179-1180 ("In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, 'on balance,' we think the law was violated here – leaving ourselves free to say in the next case that, 'on balance,' it was not.").

elected for that very function. It is conceivable that such a rule-based process of adjudication may be even more desirable in a system of international human rights enforcement so as to constrain international judges, lest they become supranational legislatures, making policy judgments on a case-by-case basis. However, the problem is that through the formulation of rules an international court not only constraints itself, but, at the same time, severely limits the power of domestic judges to interpret Convention guarantees or similarly worded domestic human rights protections. For instance, if an international bench were to decide that the expropriation of land was not, as a rule, protected under a treaty right to property, lower domestic courts would find it hard to deviate from such a bright-line directive. Domestic legislatures would then be given a jurisdictional free hand in legislating in this field, bar very clear national constitutional guarantees to the contrary. The scope of an international instrument could become limited and artificial, so as to leave those subject to it under-protected. In other words, a particularly strong emphasis on the decisional jurisdiction of non-judicial actors expressed by rules would produce judicial, though not necessarily political, conservatism.[47]

A related concern is that the adoption of formal doctrine at the supranational level may be difficult to reconcile with the distinct constitutional identities of the contracting states to an international human rights treaty. Constitutionalism only makes sense in relation to some predominant identity.[48] National, cultural or legal identity informs constitution making and adjudication, which in turn generates distinct constitutional identities. Robin West defines constitutional identity as "that aspect of our collective and individual self-conception which we owe to our shared constitutional heritage, and which at least on occasion determines outcomes in close constitutional cases in ways that overarching principles of political morality do not."[49] A nation's constitutional identity often transpires in its approach to important fundamental rights issues. For example,

47. *See* Schauer, *Formalism, supra* note 11, at 542.

48. Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and* DIVERSITY, CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY, THEORETICAL PERSPECTIVES 3, 4 (Michel Rosenfeld ed., 1994).

49. Robin West, *Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY, THEORETICAL PERSPECTIVES 245 (Michel Rosenfeld ed., 1994).

nations may reasonably disagree as to whether the denial of crimes of genocide, such as the denial of the Holocaust, deserves protection under the right to freedom of expression. Even in those countries where a "crime" of genocide denial would pass constitutional muster, opinions may differ as to the conditions that need to be satisfied to bring such a prohibition in line with free speech guarantees – e.g., publicity, specific intent to incite hatred. Similarly, reasonable disagreement is possible as to what extent a ban on the wearing of a headscarf may be permissible under the right to freedom of religion. Disparate treatments of these issues under national legal systems reflect the different constitutional values and policies of the community in which they are embedded. A rule-based solution of these matters at the international level – for instance, a decision that categorically denies free speech protection to the denial of certain historical facts or a bright-line rule that would allow a ban of certain types of headscarf in all public facilities – would then hinder the preservation and further development of distinct constitutional identities. Given the principle of subsidiarity and the importance of respect for national and regional identity, it would follow that a supranational court owes some deference to these national constitutional identities. With respect to the substantive outcome of a dispute, such deference may be accomplished, through the application of the margin of appreciation. In addition, however, deference to domestic constitutional culture should also inform a supranational court's decision-making technique. One way to achieve this goal is by avoiding the use of rule-like methods of adjudication, that leave insufficient room for the development of domestic constitutional doctrine.[50]

d. Conclusion

It will be clear by now that a transposition of the different arguments in the categorization/balancing debate to the realm of international human rights adjudication cannot support a position wholly favoring one approach over the other. On the contrary, a supranational court's style of decision-making should reflect the inherent tension between its constitutional guidance function and the need for efficiency on the one hand, and the principle of subsidiarity and respect for domestic constitutional identities on the other hand.

50. For a different view, *see* Drooghenbroeck, *supra* note 19, at 982-990 (arguing that clear judicial directives promote subsidiarity rather than undermining it).

Stated differently, in choosing a more standard- or rule-like mode of adjudication, international courts should strive not to claim too much jurisdiction, but also should not abdicate too much jurisdiction either. Too much jurisdiction would diminish certainty value, while too little jurisdiction would overly restrict the interpretive freedom of international and national courts, which could in turn diminish the real protection of rights guaranteed at the treaty level.

III. Structured Balancing

A. *Democratic Necessity: A Yardstick of Proportionality under the European Convention*

Proportionality review is an important tool of judicial decision-making employed by constitutional courts all around the world.[51] Influential elaborations of the principle of proportionality can, amongst others, be found in the case law of the German Constitutional Court and the Canadian Supreme Court.[52] Although there are significant local variations in its formulation, proportionality analysis usually consists of the following three well-known sub-tests: (1) suitability (the limiting measure must be capable of achieving the (legitimate) aim pursued); (2) necessity (the limiting measure must be the least restrictive means to achieve the relevant purpose); and (3) proportionality in the narrow or strict sense (there must be a reasonable balance between the limiting measure and the aim pursued).[53] The three components of proportionality have received ample scholarly attention. One of the factors that has been highlighted by commentators from different national backgrounds is

51. It is so pervasive today that one author has characterized it as a "universal criterion of constitutionality." DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 162 (2004).

52. *See* R. v. Oakes, [1986] 1 S.C.R. 103 (Can.); Beit Sourik Vill. Council v. Gov't of Israel, [2004] 43 ILM 1099 (Isr.); BVerfGE 67, 157, 163 (German Constitutional Court); State v. Makwanyane, 1995 (6) B.C.L.R. 665, ¶ 104 (Const. Ct., S. Afr.)

53. *See, e.g.,* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66-69 (2002); Kay Hailbronner & Marcel Kau, *Constitutional Law*, *in* INTRODUCTION TO GERMAN LAW 53, 76 (Mathias Reimann & Joachim Zekoll eds., 2005), for similar expositions. *See* generally on the topic of proportionality D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295 (1994); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY (1996); Beatty, *supra* note 52; Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004); Drooghenbroeck, *supra* note 19.

that it is not always easy to locate proportionality review on the spectrum between balancing and categorization. Depending, *inter alia*, on the question of whether the different prongs of the proportionality test will be subject to a high or low level of judicial scrutiny, proportionality review has been characterized as either a more standard-like or a more rule-like decision making process. Most commentators agree, for instance, that the Canadian Supreme Court's *Oakes* test, was originally formulated as a strict rule,[54] but has since its enunciation, come to be applied in a more open-ended balancing fashion.[55] Similarly, the various multi-tiered tests in American constitutional law, which bear clear resemblance to straightforward proportionality analysis in younger constitutional democracies, have been described in terms of either categorization or balancing, depending on the level of scrutiny they embody.[56]

As will become clear in the analysis of a number of representative cases in Part IV, the European Convention's proportionality test was never formulated, nor intended, to operate as a strict rule. Quite to the contrary, the central justificatory standard applied under the European Convention exhibits all the characteristics of a flexible, open-ended balancing test. To explain the nature of the Strasbourg Court's proportionality analysis, it is necessary to take a brief look at the first case that explored the meaning of the phrase "necessary in a democratic society"; the Strasbourg Court's decision in *Handyside v. United Kingdom*.[57]

For those who are less familiar with the Convention, the standard of *necessity in a democratic society* figures in the limitation clauses of several Convention articles, and has also penetrated the Court's work in other areas of the Convention.[58] In *Handyside*, the

54. *See, e.g.*, Blanche, *supra* note 6, at 437 (observing that, "on its face, the [Oakes] test calls for a kind of balancing at the third step of the measure of proportionality. But such a balancing does not usually take place since it is very difficult not to end the operation during the two first steps of the analysis which require proof of necessity").

55. *See, e.g.*, Donald L. Beschle, *Clearly Canadian? Hill. v. Colorado and Free Speech Balancing in the United States and Canada*, 28 HASTINGS CONST. L.Q. 187, 199 (2001); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversations on "proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 607-08 (1999); Lokan, *supra* note 6.

56. *See, e.g., Categorization and Balancing*, *supra* note 6, at 295-301.

57. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976) [hereinafter Handyside].

58. The words "necessary in a democratic society" figure in the common limitation clauses of Articles 8 to 11. *See, e.g.*, The European Convention on Human

Court considered the compatibility of the seizure and subsequent forfeiture of a book on obscenity grounds with the principle of freedom of expression of Article 10. Reflecting on the meaning of the words "necessary in a democratic society," the Court first observed that, "the adjective "necessary" . . . is not synonymous with "indispensable" . . . ,neither has it the flexibility of such expressions as "admissible," "ordinary," "useful," "reasonable" or "desirable."[59] Necessity, implies the existence of a "pressing social need," and requires that a restriction imposed on a Convention right be "proportionate to the legitimate aim pursued."[60]

The settled formulation of the democratic necessity test runs as follows: "[T]he notion of necessity implies that an interference [with a Convention guarantee] corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."[61] This standard, which is the Court's fixed point of departure for reviewing governmental action interfering with Convention rights, does not refer to the set of proportionality principles mentioned above. What, then, does the Court mean when it talks about proportionality?[62] A close look at the case law reveals that the notion is used to refer to different inquiries. In many cases, the term is employed merely to assert that a "fair balance" must be struck between the rights of the individual and the public interest.[63]

Rights, art. 8, § 2 (right to privacy): "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." For an application of the same proportionality standard in a different context, *see, e.g.,* Ashingdane v. United Kingdom, 93 Eur. Ct. H.R. (ser. A) ¶ 57 (1985) (limitation of the right of access to a court under Article 6 (fair trial))

59. Handyside, *supra* note 58, at ¶ 48.

60. *Id.* at ¶¶ 48-49.

61. *E.g.,* Olsson v. Sweden, 130 Eur. Ct. H.R. (ser. A) ¶ 67 (1988).

62. For an analysis of the principle of proportionality in the Convention context, *see, e.g.,* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE IN THE JURISPRUDENCE OF THE ECHR (Intersentia 2002); Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125 (R. St. J. MacDonald, F. Matscher & H. Petzold eds., 1993); Jeremy McBride, *Proportionality and the European Convention on Human Rights, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23 (Evelyn Ellis ed., 1999); GERHARD VAN DER SCHYFF, LIMITATION OF RIGHTS. A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS 214-217 (2005); Drooghenbroeck, *supra* note 19.

63. *See, e.g.,* James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) ¶ 50 (1986). For

Proportionality in this sense is simply a different characterization of the very act of balancing competing interests, but with an emphasis on evaluating the acceptability of all the proportions of a particular interference.[64]

What the Court is doing here resembles what is commonly known as proportionality in the narrow sense. Sometimes, the concept of proportionality is applied in a more specific sense, namely as a tool to asses the adequacy of the particular means employed to further the interest in question – for instance the nature or severity of a penalty.[65] Occasionally, the Court has also engaged in a least-restrictive-means analysis under the label of proportionality review.[66] Without going in further detail at this point, it is important to observe that the necessity standard functions as a highly flexible formula, allowing the Court to weigh competing claims of individual rights and collective goals on a case-by-case basis. In its most rudimentary form, the democratic necessity standard gives no indication as to which of the traditional proportionality principles are to be applied to particular fact situations, as to what their sequence must be, or the strictness with which they are to be applied. In other words, not only is the democratic necessity test a balancing test, it is a wholly unstructured one.[67] If one were to locate the Court's proportionality analysis on the rules versus standard continuum, its place would be at the far end of the standard side.

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another example, *see* Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) ¶ 47 (1993) ("The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate. In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused.").

64. Van der Schyff, *supra* note 63, at 215.

65. *See, e.g.*, Sürek v. Turkey (No.1), 1999-IV Eur. Ct. H.R. ¶ 64 (observing that the "nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.").

66. *See, e.g.*, Campbell v. United Kingdom, 233 Eur. Ct. H.R. (ser. A) ¶ 48 (1992); Peck v. United Kingdom, 2003-I Eur. Ct. H.R. ¶ 80.

67. For a critical account of the highly flexible nature of the democratic necessity test, *see, e.g.*, STEVEN GREER, THE EXCEPTIONS TO ARTICLES 8 TO 11 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 42 (1997); Steven Greer, *Constitutionalizing Adjudication under the European Convention on Human Rights*, 23 OXFORD J. OF LEGAL STUD. 405, 426-427 (2003); Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 MOD. L. REV. 671, 673 (1999).

B. The Margin of Appreciation

The flexible nature of the democratic necessity test is compounded by the application of the doctrine of the margin of appreciation. The notion of the "margin" first made its appearance in Commission reports regarding the derogation of rights under Article 15. For example, it was found that in reacting to an emergency in Cyprus, the United Kingdom "should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation."[68] The idea of there being a measure or margin of discretion to be afforded States in complying with Convention guarantees eventually found its way to the Court and has since become a standard feature of its jurisprudence.[69] Importantly in the *Handyside* judgment, the margin of appreciation was attributed not only to legislatures, but also to domestic courts.[70] In other words, national authorities have the power of discretion, both legislatively and judicially, in fashioning their application of the Convention. However, the Court is always quick to add that it enjoys a "supervisory function" in this respect, which it will exercise by reference to the principles characterizing a "democratic society".[71]

The question of jurisdiction clearly underpins the margin of appreciation. Although the Strasbourg Court emphasizes its own jurisdiction as guardian of the Convention, it also seeks to delimit its jurisdiction vis-à-vis national authorities so as not to replace them. The Court is careful not to be perceived as an international legislature or court of appeal, thereby jeopardizing its legitimacy and opening itself to accusations of over-reaching.

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68. Greece v. United Kingdom, 1958-1959 Y.B. Eur. Conv. on H.R. 175 .

69. *See* De Wilde, Ooms and Versyp v. Belgium, 12 Eur. Ct. H.R. (ser. A) ¶ 93 (1971) (speaking of a "power of appreciation"); Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶ 45 (1975) (speaking of a "power of appreciation"); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 207 (1978) (the first express reference to a "margin of appreciation" by the Court) for early applications of the doctrine.

70. Handyside, *supra* note 58, at ¶ 48 ("This margin is given both to the domestic legislator... and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force").

71. Handyside, *supra* note 58, at ¶ 26 ("The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society'"); Goodwin v. United Kingdom, 1996-I Eur. Ct. H.R. ¶ 40 ("[I]t is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press.").

Notably, the "democratic society," to which judgments refer as the benchmark in fixing margins, is a rather fluid concept. The Strasbourg organs have never given a systematic definition of what a democratic society amounts to, apart from statements regarding a number of its cardinal principles. For instance, it is generally accepted that such a society is characterized by pluralism, tolerance and broadmindedness.[72] These values are the bedrock of the envisaged "democratic society" against which interferences must be justified, but in themselves give little direction to the Court or domestic authorities.

Hence, the margin of appreciation preeminently serves as a tool of flexibility.[73] Its scope varies from case to case depending on a variety of issues, such as the nature of the rights concerned,[74] the existence or nonexistence of a "common ground" amongst the Member States of the Council of Europe,[75] and the nature and seriousness of the interest furthered by the limiting measure.[76] Although these factors provide some guidance as to the bases for the margin of appreciation, it remains difficult to foretell whether in any given case the margin will be wide or narrow.[77] There clearly is a

72. Handyside, *supra* note 58, at ¶ 49.

73. *See* Eva Brems, *The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240, 313 (1996): "[B]ecause flexibility is an essential element of the margin of appreciation, absolute predictability is out of the question. The concrete circumstances and context of each case will always remain very important in determining the margin of appreciation."

74. *See, e.g.*, Dudgeon v. United Kingdom, 59 Eur. Ct. H.R. (ser. A) ¶ 52 (1982) (noting that where an "intimate aspects of private life" is concerned the margin of appreciation left to the Contracting States is narrow).

75. *See, e.g.*, Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) ¶ 37 (1986) (noting that where there is little common ground between the Contracting States the latter enjoy a wide margin of appreciation).

76. *See, e.g.*, Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) ¶ 59 (1987) (recognizing a wide margin of appreciation where the protection of national security is concerned).

77. *See, e.g.*, Berend Hovius, *The Limitation Clauses of the European Convention on Human Rights: a Guide for the Application of Section 1 of the Charter?*, 17 OTTOWA L. REV. 213, 256 (1985) ("The amount of discretion left to domestic authorities is determined largely on an ad hoc basis and is, one suspects, governed to some extent by what can loosely be termed political considerations."); Lord Lester of Herne Hill, *The European Convention in the New Architecture of Europe*, Spring PUB. L. 5, 6 (1996) ("The concept of the 'margin of appreciation' has become as slippery and elusive as an eel."); Thomas A. O'Donnel, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Convention of Human Rights*, 4 HUM. RTS. Q. 474, 479 (1982) ("The U.S. Supreme Court has develop a

need for greater predictability in applying the doctrine of the margin of appreciation. Although it is certainly important for the Court to respect States' jurisdiction and national constitutional identities, this cannot be done at the expense of values such as certainty and efficiency. The Court's adjudicative method would arguably benefit from greater structure in this respect, something which is explored in greater detail below.

C. Towards a More Structured Approach

In Part II, it was argued that a supranational court's method of adjudication should adequately accommodate its constitutional guidance function and the need for efficiency on the one hand, and the principles of flexibility, subsidiarity and respect for domestic constitutional identities on the other. Clearly, in its rudimentary form the democratic necessity test does not do justice to this conception of supranational human rights adjudication. Moreover, the standard's inability to foster certainty is often exacerbated by the application of the margin of appreciation, which, in itself, is an empty vessel. This is not to say that both concepts should be abandoned. Yet, in order to attain an appropriate level of certainty and efficiency in the Court's jurisprudence, a structured application of both the democratic necessity test and the margin of appreciation is necessary. While it needs to avoid an overly rule-based approach, the European Court should engage in a structured form of balancing. In doing so, the democratic necessity test can only be the starting-point.

Structured balancing can best be described as a style of adjudication that, on the one hand, provides a meaningful degree of certainty and guidance to the national decision-makers and prospective applicants but, on the other hand, leaves sufficient leeway to the domestic constitutional courts to formulate a doctrinal approach to human rights disputes. Structuring the balancing process under the Convention can of course take a variety of forms. What is important is that an attempt is made to concretize the democratic necessity test. This process, or the translation of the completely open-ended democratic necessity test into a more or less fixed set of parameters to be applied in all comparable subsequent cases, can be

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fairly clear set of standards governing the extent of the deference to be granted, but the European Court has not."); Drooghenbroeck, *supra* note 19, at 761-764 (criticizing the discrepancies between the principals the Court announces with regard to the width of the margin of appreciation and the actual level of scrutiny).

referred to as a form of definitional balancing.[78]

Structured balancing is not a novel idea. Structured balancing tests or formulas form part of judicial practice in constitutional democracies all over the world. In the previous section, mention was already made of the traditional three-part proportionality analysis employed by a number of constitutional courts.[79] Other examples include the various multi-factor balancing tests developed in American constitutional law.[80] What marks the difference between these approaches and the democratic necessity standard is that they give clear and advance guidance to the test's parameters: Which factors will be taken into account? What weight will be attached to the different rights and interests at stake? Who must prove what before the bench? What level of scrutiny will be applied? While such tests avoid completely ad hoc decision-making, they leave considerable leeway to domestic decision-makers. This is important for two reasons; first, it allows the national courts to consider the facts and the specific local circumstances surrounding the case and second, structured balancing formulas are sufficiently open ended to allow for the development of constitutional doctrines reflecting the constitutional identities of a particular Contracting State.

Rather than giving a further theoretical account of the possible types of structured balancing, the article now turns to three case studies, the first addressing the treatment of the Islamic headscarf, the second the issue of physician-assisted suicide and thirdly, the dissolution of political parties.

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78. On definitional balancing, *see, e.g.*, Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

79. *See supra* note 53.

80. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968). ("A government regulation [of symbolic conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of [procedural] due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.").

IV. Case Studies of Structured and Unstructured Balancing under the European Convention

A. *The Case of the Islamic Headscarf*

Throughout the history of Europe religion has been, and continues to be, a source of contention. European States have divergent relationships to religion, ranging from to militant opposition against to its embrace. The fact that religion still generates a host of powerful reactions accentuates the need for the Court to give constitutional guidance in this field, allowing States to construct and maintain their own particular constitutional identities without exceeding fundamental norms as laid down in the Convention. One example of the need for such guidance pertains to regulations of the wearing of the Islamic headscarf.[81] In essence the question amounts to whether States can regulate or prohibit the wearing of a headscarf, when the wearer considers it her religious duty to cover her hair in this way.

This is exactly the question with which the Court's Fourth Section[82] and ultimately its Grand Chamber[83] were confronted by in the matter of *Leyla Şahin v. Turkey*. The applicant, a university student, lodged a complaint against Turkey arguing that the ban on the Islamic headscarf in higher-education institutions in that country constituted an unjustified interference with her right to manifest her religion, as guaranteed in Article 9 of the Convention.[84] The Fourth

81. *See* generally Decision of 24 September 2003 *BVerfGE* 108, 282 (where the German Federal Constitutional Court decided that each sub-state had to decide for itself whether it should ban teachers from wearing headscarves); Begum v. Headteacher and Governors of Denbigh High School [2006] UKHL 15 (where the British House of Lords allowed a school to enforce its dress code that disallowed a pupil from wearing clothing based on her religious conviction); T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV 419(2004); Axel von Campenhausen *The German Headscarf Debate*, 2004 BYU L. REV 665 (2004); Emmanuelle Bribosia and Isabelle Rorive, *Le voile à l'école: une Europe divisée*, 59 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 951 (2004); Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94 (2005); Ann Blair and Will Apps, *What not to Wear and Other Stories: Addressing Religious Diversity in Schools*, 17 EDUC. AND THE L. 1 (2005).

82. Leyla Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2004) (Fourth Section) [hereinafter Şahin, *Fourth Section*].

83. Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. (Grand Chamber) [hereinafter Şahin, *Grand Chamber*].

84. *Convention, supra* note 4, at Art. 9. "(1)Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or

Section, and subsequently also the Grand Chamber, found that the State interfered with the applicant's right, thereby requiring justification under Article 9(2).[85] This entailed the questions of whether the interference was "prescribed by law," whether it pursued a "legitimate aim" and whether it was "necessary in a democratic society."

In testing the State's justification, both benches found that the interference enjoyed a basis in Turkish law, satisfying the first inquiry.[86] It was also accepted by both that the ban pursued legitimate aims, namely that of maintaining public order in universities and the protection of the rights and freedoms of others.[87] This left only the democratic necessity test. The Grand Chamber again confirmed the finding of the Section that the Islamic headscarf ban was justified in principle and proportionate to the aims pursued and, could consequently be considered as necessary in a democratic society.[88] In other words, by imposing a ban the Turkish authorities did not violate the applicant's right to freedom of religion. However, a dissenting opinion, written by Justice Tulkens, disagreed with the Chamber's decision. In analyzing the various judgments it

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belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

85. Şahin, *Fourth Section, supra* note 83 at ¶ 71; Şahin, *Grand Chamber, supra* note 84, at ¶ 78. *Contra* Karaduman v. Turkey, App. No. No. 16278/90, 74 Eur. Comm'n H.R. Dec. & Rep. 93 (1993) (where the erstwhile Commission found that a secular university did not interfere with the right to freedom of religion of the applicant where it withheld her degree certificate because of her refusal to remove her headscarf for an official photograph).

86. Şahin, *Fourth Section, supra* note 83, at ¶ 81; Şahin, *Grand Chamber, supra* note 84, at ¶ 98.

87. Şahin, *Fourth Section, supra* note 83, at ¶ 84; Şahin, *Grand Chamber, supra* note 84, at ¶ 99.

88. Şahin, *Fourth Section, supra* note 83, at ¶¶ 114-115; Şahin, *Grand Chamber, supra* note 84, at ¶¶ 122-123. Rozakis and Vaji JJ. concurred in a separate opinion (finding that the majority only needed to consider the application on the grounds of the right to freedom of religion in article 9, and not also the right to freedom of education in article 2 of Protocol 1 to the Convention). The decision of the Grand Chamber was subsequently referred to in the admissibility decision of *Köse v. Turkey* of 24 January 2006, in which the Court held that school uniform regulations, which meant that a headscarf could not be worn, would not have constituted a violation of the right to freedom of religion in article 9 had it amounted to an interference in the first place.

immediately becomes clear how unstructured the majority of the Grand Chamber, and the Fourth Section before it, was in balancing the various competing interests. In contrast, the dissenting opinion of Justice Tulkens shows a much greater concern for structure in the balancing process.

i. Fourth Section and Grand Chamber

Although both the Fourth Section (hereinafter "Section") and the majority in the Grand Chamber (hereinafter "Majority") found the ban to be justified, their statement of the general principles to be applied in testing the justification for the interference contained noteworthy differences. As to the similarities in the two decisions, both were in agreement that in delimiting the State's margin of appreciation, particular attention had to be paid to the existence of a common European approach to the significance of religion in society and its role in relation to the State. It was found that such a consensus was lacking among the States, especially when it pertained to regulating the wearing of religious symbols in educational institutions. This meant that particular attention had to be paid to the role of national decision-making bodies in deciding such matters.[89] This element increased the State's margin of appreciation because no common European standard could be identified with which to measure the desirability of such a ban. Both benches were therefore in agreement that a deferential standard of review had to be applied.

Where the decisions differed was in the Section which, unlike that Majority, stated that the scope of the State's margin of appreciation had to be determined by considering the importance of a Convention right, the nature of the restricted activities and the aim of

89. Şahin, *Fourth Section, supra* note 83, at ¶¶ 101-102; Şahin, *Grand Chamber, supra* note 84, at ¶ 109. *See also* Otto Preminger v. Austria, 295 Eur. Ct. H.R. (ser. A), ¶ 50 (1994) ("As in the case of 'morals' it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (...) even within a single country such conceptions may vary. (...) A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference."). *See also* Wingrove v. the United Kingdom, 1996-V Eur. Ct. H.R. ¶ 58 ("What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations."); Aernout Nieuwenhuis, *European Court of Human Rights: State and Religion, Schools and Scarves. An Analysis of the Margin of Appreciation as Used in the Case of Leyla Sahin v. Turkey*, 1 EUR. CONST. L. REV. 495 (2005) (highlighting the different approaches to state and religion in Europe).

the restrictions.[90] The Majority mentioned the importance of the right to freedom of religion in its opening statement, but it did not explain whether this had to be factored into the decision.[91] Contrary to its own principles, the Section did not consider the importance of the right to freedom of religion, limiting its investigation to the aim of the restriction and the State's desire to protect secularism and promote equality between the sexes by insisting on the ban.[92] Secondly, applying its guiding principles to the facts, the Section held that the reasons adduced by the State in justifying the ban had to be "relevant and sufficient".[93] Although this has become an important and somewhat established phrase in the Court's vocabulary on the limitation of rights, the Majority did not rely on this standard, nor did it explain the reason for this omission.[94]

Both judgments did find convincing the government's argument that upholding the principle of secularism can be considered "necessary for the protection of the democratic system in Turkey."[95] Yet, it remains unclear from both judgments whether the standard applied is limited to the facts of this case or may also be applied to future disputes before the Court. This is important because, although threats against secularism in Turkey might easily justify a headscarf ban under the standard, the same may not be true for other States.

For example, should the headscarf ban in French state schools also be justified as "necessary for the protection of the democratic system" even though France has a different political situation than Turkey? Could the fact that the standard was expressed during the application of the general principles to the facts at hand, and not as part of the statement of such principles, be a clue as to its *ad hoc* nature? The Court did not say.

This is all rather remarkable, as one would have thought that a simple statement of general principles – standards which are undoubtedly also intended to guide national authorities – would have

90. Şahin, *Fourth Section, supra* note 83, at ¶ 101.

91. Şahin, *Grand Chamber, supra* note 84, at ¶ 104 (arguing that religious freedom was one of the foundations of a democratic society and one of the most vital elements that make up the identity of believers and their conception of life).

92. Şahin, *Fourth Section, supra* note 83, at ¶¶ 104-113.

93. *Id.* at ¶ 103.

94. *See, e.g.*, Moscow Branch of the Salvation Army v. Russia, 2006 Eur. Ct. H.R. ¶ 77 (holding that interferences with the right to freedom of religion had to be "relevant and sufficient").

95. Şahin, *Fourth Section, supra* note 83, at ¶ 106; Şahin, *Grand Chamber, supra* note 84, at ¶¶ 114 (majority opinion); 5 (dissenting opinion).

shown greater consistency between two judgments essentially in agreement with one another. One would expect greater consistency between the two judgments, considering that they rely on the same general principles. The internal inconsistencies of the decisions are also worth noting as they illustrate how the general principles are distilled only to be applied in a haphazard fashion. It is fair to say that both judgments essentially followed an *ad hoc* approach to balancing. Principles and factors were seemingly created and referred to where necessary. This emphasizes the Court's dynamic approach over its adherence to certainty and efficiency. Although bright line categorical rules cannot be expected in such a complex field, one would have expected a greater attempt at structuring the guidelines as to how balancing is to be conducted.

ii. Dissenting Opinion

The above mentioned structural concerns also preoccupied Justice Tulkens. Although she accepted that a lack of consensus may lead to a wide margin of appreciation, and by implication a lenient standard of review, she lamented what she perceived to be a total lack of supervision.[96] At the outset of her opinion, she developed a general justificatory test resembling the traditional formulation of the principle of proportionality: first, whether the interference was appropriate; second, whether the interference was the least restrictive measure possible; and lastly whether it was proportionate.[97] Tulkens wrote that the Court's review had to be conducted *in concreto*, meaning the actual position of the applicant had to be considered in how the interference affected her in particular.[98] This becomes quite clear from the fact that she not only considered *secularism* and *equality* as reasons for limiting the right, but also *liberty*, and more particularly the liberty of the applicant, as a reason not to limit the right—this is something which the Section and Majority did not do.[99] Instead, the benches conducted a rather detached and abstract review by focusing on the general situation as such, without relating their decisions to the applicant's plight in any meaningful way.

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96. Şahin, *Grand Chamber, supra* note 84, at ¶ 3 (dissenting opinion) ("European supervision cannot. . . be escaped simply by invoking the margin of appreciation."). On the facts though she found that there did indeed exist consensus between States, thereby requiring a more stringent level of review.

97. *Id.* at ¶ 2.

98. *Id.* ("The Court's review must be conducted *in concret*....").

99. *Id.* at ¶ 4.

Focus on the facts as they apply to a particular applicant entail a heavier burden for the State to satisfy than if it simply had to advance general arguments, the truth of which is not open to any real dispute. Justice Tulkens also observed that the Majority made no distinction between teachers and students when it came to wearing the Islamic headscarf, whereas she felt that such a difference had to be factored into the court's decision.[100] Tulkens relied on the decision in *Dahlab v. Switzerland,* where the Court took note of a teacher's role-model position toward her students and the possible proselytizing effect her wearing of the headscarf might have on them.[101] This is a distinction that the Section and Chamber failed to factor into their decisions, although both judgments referred to the *Dahlab* decision.[102]

iii. Structured Balancing Test

The overall question then to be answered is: how should, or rather how could, the Court have proceeded in ensuring better structured judgments that not only respected States' jurisdiction, but also ensured certainty and efficiency? A number of approaches could conceivably have been followed. For example, the Court could have focused its efforts on formulating a balancing approach that not only dealt with headscarves, but with interferences restricting the wearing of religious apparel and symbols as such. This would have given more guidance to national authorities in such matters, thereby enhancing certainty and efficiency, and stressing the Court's constitutional function by not simply opting for a decidedly *ad hoc* solution. Essentially, the various judgments contain sufficient material for a more structured balancing test to have been laid down.

Such a test could, for instance, have taken as its basis the private-public divide, referred to in Article 9.[103] This would have given ample

100. *Id.* at ¶ 7 ("While the principle of secularism requires education to be provided without manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students seems to me to be different.").

101. Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. ¶ 1(concerning a teacher of small children at a state school being prohibited from wearing the headscarf after her conversion to Islam).

102. Dissenting Opinion of the Grand Chamber, *supra* note 84, at ¶ 7 ("While the principle of secularism requires education to be provided without manifestation of religion and while it has to be compulsory for teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students seems to me to be different.").

103. In characterising the private/public divide it can for instance be argued that

room to hold that European consensus dictates that the wearing of religious apparel and symbols in private had to enjoy a sufficiently higher and uniform measure of protection, while the lack of consensus about wearing such items in public, justified a wider margin of appreciation for States. The Court could then have decided explicitly on particular levels of review. For example, a limitation on the wearing of religious dress in private needs to be "compellingly" proved, while similar restrictions in public can be justified by a lower level of review. Drawing on the distinction in *Dahlab v. Switzerland,* it can be argued that restrictions on religious dress in public must meet a lower level of justification where they concern public officials and other persons exercising symbolic functions. A higher level of review could be required for private persons engaging in everyday professional, educational, commercial and social interaction.[104] Restrictions affecting the first category could then be justified if "adequately" proved by the State, while the second category could be afforded a higher level of protection with "sufficient" proof being required. The tests, so developed, could be refined by determining whether a judge has to test a matter *in concreto* or *in abstracto* – this was not always sufficiently expressed by the judgments. In complementing the various levels of review it can be argued that restrictions that require "compelling" and "sufficient" proof must be tested *in concreto*, while restrictions requiring "adequate" proof may be tested *in abstracto*. This would help to concretize what is actually meant by the different levels of review. In other words, the higher the level of review, the closer the inspection of the facts, and the facts

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the greater the State's interest in, or the need for it to regulate, a particular subject matter the greater its public nature. *E.g.,* a wholly privately funded educational institution based on a particular religious or philosophical conviction would clearly belong to the private sphere in comparison to a wholly state-funded educational institution based on the principle of secularism. The private sphere could also extend to institutions that enjoy state-funding, either in full or partially, where the purpose is to guarantee such an institution's autonomy. In this regard mention can be made of state funding for religious organizations in Belgium, which is aimed at allowing such organizations to exercise their autonomy, instead of them becoming part and parcel of the public domain. *See* Rik Torfs, *Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences*, BYU L. REV. 946, 955-960 (1996). It also speaks for itself that one's home would belong to the private sphere.

104. *I.e.* different categories of people justify different levels of review. *See, e.g.,* Vogt v. Germany, 1996-IV Eur. Ct. H.R. ¶ 60 (noting the special role that teachers fulfill in respect of their pupils); Ahmed v. United Kingdom, 1998-VI Eur. Ct. H.R., ¶¶ 63-65 (finding that restrictions on the political activities of local government officers were justified in the interest of impartiality owed by such officers).

particular to the case at hand, must be; while the lowest level of review will be satisfied with a broad and general inspection of the facts.

Refinement could also be introduced, by not only mentioning various values to be weighed by a court or some other national authority, but also by attaching particular weight to such values in aiding balancing. The various judgments above bring a few such values to the fore and also give a number of clues as to their weight. For example, some values to be distilled are clearly the liberty of the subject and the protection of secularism. In translating these values to the proposed levels of review, it can be argued that secularism is not to be a factor regarding restrictions of the private sphere, while it may be factored for the public sphere – giving the State more leeway in pursuing secularism the lower the justification is, while still protecting the private sphere from unwanted State intrusion. The opposite would also ring true, namely the more stringent the level of justification, and the more concrete the review: the higher the regard to be paid to the liberty of the subject, or stated differently the importance of the right at issue. Similar factors could also obviously be devised for other values or purposes, such as the achievement of equality by imposing a ban on religious apparel. Moreover, "the less restrictive means test", as mentioned by Justice Tulkens, could also be included to indicate the severity with which a level of review is to be applied. The more stringent the level of review, the more regard must be paid to alternative means for the State in achieving its purpose. This would mean that only very important purposes could outweigh a subject's right where a higher level of justification is required.

In practice, such a composite test of democratic necessity under Article 9 might be formulated and structured as follows:

> Having considered the need to construct and maintain a common European constitutional identity while not replacing individual national identities, a restriction of the wearing of religiously inspired apparel or symbols will be considered proportional and necessary in a democratic society where such a restriction, the onus of proof resting on the State:
>
> a) of the private sphere is compellingly proved: the Court having reviewed the facts *in concreto*, having placed weighty emphasis on the liberty of the subject in relation to the importance and extent of the purpose and where the State

> does not pursue secularism and where the State cannot achieve its purpose by means of less restrictive reasonable alternatives.
>
> b) of the public sphere – where it concerns private persons engaged in professional, educational, commercial, social or comparable activities – is sufficiently proved: the Court having reviewed the facts *in concreto*, having placed particular emphasis on the liberty of the subject in relation to the importance and extent of the restriction, and where the State considered achieving its purpose by means of less restrictive reasonable alternatives.
>
> c) of the public sphere – where it concerns public officials or other persons engaged in powerful symbolic functions – is adequately proved: the Court having reviewed the facts *in abstracto*, having placed emphasis on the liberty of the subject in relation to the importance and extent of the restriction.

The above is but an example of a structured balancing test that can arguably be constructed from the Court's existing case-law, especially drawing on some of the themes addressed by the various benches in the *Leyla Şahin* judgments. Not only does this test introduce levels of review, it also demarcates the scope of application of the various levels, and gives guidance as to whether facts are to be reviewed concretely or abstractly each time. It also determines the relative importance of the liberty of the subject, in this case the right to freedom of religion, as the background or measure against which a State's interference must be judged. In judging the justifiability of a State's restriction, the various levels also indicate the extent to which reasonable alternatives can or must be factored. This relies on the Court's practice of only considering reasonable alternatives in the most serious of cases, and not in all matters before it.[105] The added structure also brings the margin of appreciation to life, in a tangible way, by allowing more discretion under some circumstances than others – something that the Court already does, but in a rather *ad hoc*

105. *See, e.g.*, Vogt v. Germany, *supra* note 105, at ¶ 59 (questioning the absolute nature of loyalty, and its far-reaching consequences, expected by Germany of its civil servants); Ahmed v. United Kingdom, *supra* note 105, at ¶ 63 (investigating whether the State pursued its purpose with minimum impairment of the applicants' rights); Foxley v. United Kingdom, App. No. 33274/96, Eur. Ct. H.R. ¶ 43 (2006) ("the implementation of the measures must be accompanied by adequate and effective safeguards which ensure minimum impairment of the right").

fashion. Here it is important to note that in giving structure to national authorities' discretion, one does not necessarily limit their discretion, but streamlines its application for future cases. In other words, structured balancing does not have to mean that the Court intrudes on national jurisdictions more so than it would have done using other methods of adjudication. As a matter of fact, the Section and Grand Chamber would probably have achieved the same result had it applied the proposed test, but with the added benefit of having given real constitutional guidance. The test is also wide and broad enough to serve as the starting point for dissenting judgments to add to or subtract from, while leaving a national authority ample room to increase the level of protection it wants to render its subjects under the test.

B. The Case of (Physician) Assisted Suicide

A second example of an unstructured application of the democratic necessity test in a highly controversial matter can be found in the Court's approach to (physician) assisted suicide. Laws around Europe vary greatly with regard to assisted suicide, it being legal in some nations, while criminal in others. An important issue is whether a prohibition of assisted suicide may amount to a violation of one or more of the fundamental rights of (terminally ill) individuals who would choose to avoid what they consider to be an undignified end to their lives. In *Pretty v. United Kingdom*, the European Court considered the issue from the perspective of articles 2 (right to life), 3 (prohibition of inhuman and degrading treatment) and 8 (right to private life).[106] It held that no right to die could be derived from Article 2 and that no positive obligations for the State arose under Article 3 to provide a lawful opportunity for assisted suicide.[107] Hence, the analysis primarily focused on Article 8. According to the Court, a ban on assisted suicide amounts to an interference with the right to "private life", thus requiring justification under the second paragraph of Article 8.[108] The Court gave an expansive interpretation of the concept of "private life," reading within its ambit the notion of

106. Pretty v. United Kingdom, 34 Eur. Ct. H.R. 1 (2002) [hereinafter Pretty]. For a comprehensive discussion of the case, *see* Olivier De Schutter, *L'aide au suicide devant la cour européenne des droits de l'homme*, 53 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 71 (2003).

107. Pretty, *supra* note 107, at ¶¶ 34-42; 43-56.

108. *Id.* at ¶¶ 62-67. (citing with approval Rodriguez v. the Attorney General of Canada, [1994] 2 L.R.C. 136 (Can.)).

"personal autonomy" and "the ability to conduct one's life in manner of one's choosing."[109] Both concepts, the Court reasoned, may involve the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature, even activities resulting in the death of the individual concerned.[110] In this respect, emphasis was placed on notions such as "human dignity", "human freedom" and "the quality of life."[111]

The decision to bring the 'right' to assisted suicide within the notion of "private life" may be subject to criticism.[112] What is beyond dispute, however, is that once the Court has established that certain conduct falls within the scope of Article 8(1), interference by the State needs to conform to the requirements of Article 8(2). In this regard, the parties and the Court agreed that the restriction on assisted suicide was "in accordance with the law" and pursued the legitimate aim of safeguarding life and thereby protecting the rights of others.[113] The debate therefore centered on the question whether the British legislation – which contained a blanket ban on assisted suicide – was "necessary in a democratic society." In light of the rather sweeping statements on the importance of human dignity and the quality of life under the definitional prong, it may be somewhat surprising that the Court needed only a page and a half to conclude that the total prohibition on assisted suicide was proportionate to the aims pursued and consequently satisfied the democratic necessity test. How did the Court apply the democratic necessity standard in this case?

As is usually the case, the Court began its judgment with a statement of the general principles governing Article 8(2).[114] To start with, the notion of necessity implies that the interference corresponds to a "pressing social need" and that it is "proportionate to the legitimate aim pursued." Further, the national authorities are allowed a margin of appreciation in determining whether interference

109. *Id.* at ¶¶ 61-62.

110. *Id.* at ¶¶ 62-64 ("As recognized in domestic case-law, a person may claim to exercise a choice to die by declining to consent to treatment which might have the effect of prolonging his life.").

111. *Id.* at ¶ 65.

112. Compare Washington et al. v. Glucksberg et al., 521 U.S. 702 (1997) (the right to assistance in committing suicide is not a fundamental liberty interest protected by the Fourth Amendment Due Process Clause).

113. Pretty, *supra* note 107, at ¶ 69.

114. *Id.* at ¶ 70.

is necessary in a democratic society, but their decisions remain subject to review by the Court for conformity with the requirements of the Convention. Finally, the margin of appreciation to be accorded to the national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. As noted, these generalized observations allow for great flexibility and say little as to how the Court goes about in balancing the competing interests at stake. It is remarkable that the *Pretty* judgment gives no further guidance in this connection, except for the statement that "[t]he more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the countervailing principle of personal autonomy."[115] The adjudicative method adopted in this phrase is that of proportionality in the narrow sense: the weighing of the importance and/or degree of infringement of one interest (i.e. public health and safety) against the importance of satisfying the other (i.e., personal autonomy). But what about the other components of traditional proportionality review? Under what standard of review are they to be applied? Which of the parties bears the evidentiary burden, for instance of demonstrating that an absolute prohibition is justified? The Court did not say. Perhaps most telling in this regard are the Court's observations regarding the margin of appreciation. When the Court applied its general principles on the margin of appreciation to the case at hand, it recalled two cases in which it held that the margin is narrow "in the intimate area of an individual's sexual life."[116] Rejecting the applicant's arguments for a similarly "compelling reasons" test in this case, the Court merely stated that it "does not find that the matter under consideration in this case can be regarded as of the same nature, or as attracting the same reasoning."[117] Why is this so? Are individual end-of-life decisions less personal or fundamental than decisions about sexual life?[118] The Court gave no further indications as to the width of the margin of appreciation in the case at hand, or, more generally, the broader area of end-of-life decisions. No analysis was made of the

115. *Id.* at ¶ 74.

116. *Id.* at ¶ 71.

117. *Id.*

118. For a different view, *see* Cruzan v. Missouri, 497 U.S. 261, 281 (1990) ("The choice between life and death is a deeply personal decision of obvious and overwhelming finality."); *See also* John Rawls, Judith Jarvis Thomson, Robert Nozick, Ronald Dworkin, T.M. Scanlon, & Thomas Nagel, *Assisted Suicide: The Philosopher's Brief*, NEW YORK REVIEW OF BOOKS, Mar. 27, 1997, in Volume 44.

traditional margin of appreciation-criteria, such as the nature of the rights and interests concerned, and the existence or nonexistence of a "common ground" amongst the Member States of the Council of Europe.

However, an interesting feature of the *Pretty* case is that while the Court made no attempt at formulating a structured balancing test to guide domestic decision makers in the area of end-of-life decisions, its factual analysis exhibits an approach that could be described in terms of structured balancing, namely 'rational basis' analysis. In American constitutional law, rational basis review is the lowest level of scrutiny. It asks whether governmental action at issue is "reasonably" or "rationally" related to a "legitimate" government interest.[119] While these terms do not figure in the *Pretty* judgment, the resemblances between the Court's reasoning in *Pretty* and traditional rational basis review are striking. Thus, for instance, the Court explicitly declined to engage in some form of less restrictive means analysis of the blanket prohibition of assisted suicide under review. What is more, the Court did not even require the Government to demonstrate that no conceivable alternative to a complete ban would be able to adequately reconcile the need to protect vulnerable patients and competing individual liberty interests. As the Court put it: "[M]any [patients] will be vulnerable, and it is the vulnerability of the class which provides the rationale for the law in question."[120] And: "It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures."[121] The Court even went as far as to suggest that there was no evidence that the applicant was vulnerable and was accordingly in need for protection. However, declining to consider Mrs. Pretty situation *in concreto*, it nevertheless found a violation of the Convention.[122] Such review is again *in abstracto* and points to the highly deferential approach taken in this case. Finally, the hypothesis that the Court engaged in some form of rational basis review is further substantiated when one compares the reasoning and results in the *Pretty* case with similar American and Canadian cases,

119. *See, e.g.,* United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

120. Pretty, *supra* note 107, at ¶ 74.

121. *Id.*

122. *Id.* at ¶¶ 73; 75.

in which the courts made a more conscious application of the rational basis standard.[123]

The conclusion of the forgoing analysis is that it is difficult to place the *Pretty* approach on the spectrum between categorization and balancing. The Court applied the democratic necessity test and the doctrine of the margin of appreciation in the most flexible way. No attempt whatsoever was made to (explicitly) concretize these open-ended concepts in more structured balancing avenues that would allow for more certainty and efficiency in the growing area of end-of-life decisions. That there may be a need for further guidance by the Convention organs in this area was, however, implicitly acknowledged in the Court's observation that "[i]n an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."[124] No such guidance is provided by the *Pretty* decision, save with regard to the concrete issue before the Court. Indeed, the ultimate outcome of the case was phrased in a rather categorical fashion: namely that an absolute ban on assisted suicide is, as a rule, whatever the specific circumstances of the case, never in violation of Article 8.

C. The Case of the Dissolution of Political Parties

One would be wrong to conclude from the headscarf and the assisted suicide cases that the Strasbourg organs have never sought to engage in a more rule-based decision-making process. To begin with, there are several instances in which the Court and the erstwhile Commission adopted the method of category definition.[125] The use of category definition typically occurs at the definitional stage.[126] Thus, for instance, the abuse of rights provision in Article 17 has been

123. *See* Glucksberg, 521 U.S. at 728 ("The Constitution... requires that Washington's assisted-suicide ban be rationally related to legitimate government interests."); Rodriguez v. the Attorney General of Canada, *supra* note 110, at 111 et seq. (holding that in this "contentious" and "morally laden" area, it suffices that an prohibition on assisted suicide is "rationally connected" to the government purpose, and the government show "that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment").

124. Pretty, *supra* note 107, at ¶ 65.

125. *See also* Warbrick, *supra* note 37, at 1080-1081 (identifying various areas in which the Strasbourg organ's relied on 'bright-line' solutions).

126. *See supra* note 5.

interpreted to categorically deny Article 10 (freedom of expression) protections to revisionist speech. In the Court's opinion, there is "a category [of] clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17."[127] As noted, this approach is highly problematic in the context of international human rights adjudication, as it trades subsidiarity and respect for domestic constitutional identities for the principles of certainty and efficiency. There are certain areas, however, in which the Court clearly engages in what might be called structured balancing. Most examples can be found in the field of freedom of expression (Article 10) and association (Article 11).[128] Perhaps one of the most promising examples is the Strasbourg Court's jurisprudence with regard to the dissolution of antidemocratic political parties.[129]

The modern Convention approach to party closures was developed in a series of cases against Turkey, a process which ultimately cumulated in the landmark judgment of *Refah Partisi (the Welfare Party) and Others v. Turkey*.[130] In 2001, the Third Section of the Court held, by four votes to three, that the dissolution of the political party Refah by the Turkish Constitutional Court did not amount to a violation of Article 11. On request of the applicants, the case was referred to the Grand Chamber, which in 2003 unanimously confirmed the Third Section's judgment. Both the Third Section and the Grand Chamber concurred in the Turkish Government's view that the political plans of Refah were incompatible with the concept of a secular democratic society. In the Court's opinion, the acts and

127. *See, e.g.*, Lehideux and Isorni v. France, 30 Eur. Ct. H.R. 665, 679-81 (2000).

128. For examples, *see* Stefan Sottiaux, TERRORISM AND THE LIMITATION OF RIGHTS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UNITED STATES CONSTITUTION (2008).

129. For a discussion of these cases, *see, e.g.*, Mustafa Koçak & Esin Örücü, *Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights*, 9 EUR. PUBLIC LAW 399 (2003); Stefan Sottiaux, *Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication*, 22 NETHERLANDS Q. OF HUM. RTS. 585 (2004).

130. *See, e.g.*, Case of United Communist Party of Turkey and Others v. Turkey, App. No. 19392/92, Eur. H.R. Dec. & Rep. 1998; Socialist Party and Others v. Turkey, App. No. 21237/93, Eur. H.R. Dec. & Rep. 1998 ; Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, App. No. 23885/94, Eur. H.R. Dec. & Rep. 1999; Refah Partisi (the Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Eur. H.R. Dec. & Rep. 2001 (Third Section) [hereinafter Partisi, *Third Section*]; Refah Partisi (the Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Eur. H.R. Dec. & Rep. 2003 (Grand Chamber) [hereinafter Partisi, *Grand Chamber*].

speeches of the political party's members and leaders revealed its long-term policy of setting up a regime based on Islamic law within the framework of a plurality of legal systems. The Court also accepted the contention that some of Refah's leaders did not exclude recourse of force in order to implement its policy. Having reached the conclusion that Refah's goals were anti-democratic from a Convention perspective, the Court went on to formulate the standards by which freedom-restricting measures against such parties must be judged.

The Third Section and the Grand Chamber had little difficulty to recognize that the impugned measures were "prescribed by law" and pursued a "legitimate aim," and immediately turned to the question of whether the dissolution was "necessary in a democratic society."[131] In this respect, both judgments contain a lengthy summing-up of the settled principles regarding the position of political parties and the limits within which they may conduct their activities under the Convention system. Two observations merit particular attention in the present context. The first observation figures in both judgments. It is the rather rule-like observation that "a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles."[132] Without going into the debate about the theoretical underpinnings of such a mainly content-based test,[133] it is clear that both conditions are framed in rather strict language, seemingly leaving "subversive' political parties with no Article 11 protection whatsoever. According to the Third Section, a political party's program may not violate "one or more rules of democracy" and a party's political method must "in every respect" be "legal and democratic".[134] However, contrasting these observations are the more protective and standard-like statements that immediately follow them in the Grand Chamber's judgment. The Grand Chamber further explained that only "convincing and compelling reasons" can justify restriction on political parties, that Contracting States have only a "limited margin

131. Partisi, *Third Section*, *supra* note 131, at ¶¶ 37-42; Partisi, *Grand Chamber*, *supra* note 130 at ¶¶ 52-67.

132. Partisi, *Third Section*, *supra* note 131, at ¶ 47; Partisi, *Grand Chamber*, *supra* note 130, at ¶ 98.

133. *See* Sottiaux, *supra* note 130.

134. Partisi, *Third Section, supra* note 131, at ¶ 47.

of appreciation" in this respect, and that the European Court's supervisions must be "rigorous" where political parties are concerned.[135]

At first sight, it is not entirely clear how these generalized statements relate to one another. However, much of the confusion is eliminated when one reads the remainder of the Grand Chamber's opinion. According to the unanimous judgment, "drastic measures" – such as the dissolution of an association – may be taken only in the most serious cases.[136] In this connection, the Court reflected on what it called "the appropriate timing for dissolution", holding that "a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent."[137] In light of these considerations, the Grand Chamber articulated a new overall standard for assessing whether the dissolution of a political party satisfies the requirements of the democratic necessity test. In order to ascertain whether dissolution meets a pressing social need, the Court must concentrate on the following three points:

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society."[138]

This is neither the place to assess the substantive merits of the *Refah* formula nor its relation to other principles announced elsewhere in the *Refah* judgments.[139] What is important in the present context is to highlight the doctrinal qualities of the three-part test. From a theoretical perspective, the test can be characterized as a

135. Partisi, *Grand Chamber, supra* note 131, at ¶ 100.

136. *Id.* at ¶ 100.

137. *Id.* at ¶ 102.

138. *Id.* at ¶ 104.

139. *See* Sottiaux, *supra* note 129 (discussing the relationship between the 'imminence' requirement and the 'incitement' standard endorsed elsewhere in the Refah judgments).

concretization of the democratic necessity standard, providing guidance to domestic decision-makers and applicants with regard to party closures, and arguably other "drastic measures" against political associations.[140] In addition, the *Refah* test offers an efficient framework for the Court to assess similar cases in the future. Yet, at the same time, the test is sufficiently flexible and open-ended to accommodate different domestic views on the contentious issue of how a democratic state should best deal with its enemies. In judging the legitimacy of far-reaching restrictions on a political party, the Court will look both at the content and the consequences of the party's program and actions: not only need "the model of society conceived and advocated by the party be incompatible with the concept of a democratic society," it must also present a "sufficiently imminent" threat to the democratic regime. Rather than requiring that there be strict compliance with "fundamental democratic principles," and permitting only action that is in "every respect" "legal and democratic," the Grand Chamber employs the somewhat vaguer terms of a "clear picture" of a political system that is incompatible with the "concept of a democratic society." In addition, although clearly intended to supplement the content-centered inquiry with a requirement of immediacy, the notion of a "*sufficiently* imminent" "risk to democracy" is sufficiently open-ended to justify the conclusion that the *Refah* test is a standard more than a rule.[141] Thus by avoiding an overly statutory-like approach, the Court leaves room for the preservation and development of domestic constitutional doctrine reflecting the different constitutional identities of the Contracting States.

V. Conclusion

In recent years, the Strasbourg Court's decision-making process has been increasingly subject to criticism for its lack of theoretical and conceptual coherence.[142] In his comprehensive work on the principle

140. *See* Partisi, *Grand Chamber*, *supra* note 131, at ¶ 100.

141. It is interesting to contrast the notion of a "sufficiently imminent risk to democracy" with the stricter "imminent lawless action" requirement adopted by the United States Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The *Brandenburg* test, which is used to review restrictions on violent-conductive speech, is generally considered to be a categorical rule. *See, e.g.*, John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1491 (1975).

142. Warbrick, *supra* note 37, at 1079.

of proportionality in the case law of the Convention, Sébastien van Drooghenbroeck deplored the European Court's decisional minimalism and its reluctance to develop Convention doctrine, calling these features symptoms of the "radical mootness" of the European judge.[143] What is clear is that the highly flexible democratic necessity test, combined with the unpredictable application of the doctrine of the margin of appreciation, can no longer be considered a satisfactory adjudicative approach for a Court with the largest territorial jurisdiction of all permanent international courts. It is submitted in this paper that the European Convention system, and international human rights law more in general, is in need of a clearer theoretical account of the nature of international human rights adjudication. Such a theory will encounter many difficulties, the most important of which is perhaps the relationship between the constitutional protection of fundamental rights at the domestic level and international human rights adjudication.

The purpose of this paper was to explore some of these issues. Its central idea is that an international tribunal should adopt an adjudicatory style that reflects the inherent tension between its guidance function and the need for efficiency on the one hand, and the principle of subsidiarity on the other hand. The solution defended here is that courts, responsible for supervising human rights compliance in different nations, should engage in what might be called structured balancing. This is a method of decision-making that, on the one hand, avoids overly categorical reasoning, but, on the other hand, shies away from the purely ad-hoc balancing approach.

143. Drooghenbroeck, *supra* note 19, at ¶ 849.